SERVED: June 11, 1992

NTSB Order No. EA-3581

UNITED STATES OF AMERICA

NATIONAL TRANSPORTATION SAFETY BOARD

WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 28th day Of April, 1992

BARRY LAMBERT HARRIS,
Acting Administrator,
Federal Aviation Administration,

Complainant,

v.

Docket SE-9768

RICHARD LEE MILLER,

Respondent.

OPINION AND ORDER

The Administrator has appealed from the initial decision issued by Administrative Law Judge William R. Mullins on November 22, 1989, following an evidentiary hearing held earlier.[1] The proceeding was initiated by a November 2, 1988 order of suspension (complaint), in which the Administrator alleged that respondent had violated sections 135.243 and 135.244(a) of the Federal Aviation Regulations ("FAR"), 14 CFR Part 135, and suspended respondent's airman certificate for 15 days.[2]

---

[1]The initial decision and order is attached.

[2]As pertinent, section 135.243, Pilot in command qualifications, reads:

(continued. . .)

The basis of the complaint was respondent's actions on October 20, 1987 as pilot in command (PIC) of a Piper Model PA-31-325 "in the conduct of a commuter air operation on behalf of Miller Flying Service for the benefit of Midcontinent Airlines, d/b/a Braniff Express.'! The complaint alleged that this violated sections 135.243 and 135.244(a)(2), in that respondent held no airline transport pilot certificate (ATP),[3] and had not had the required 15 hours of operating experience in commuter operations in the aircraft.

---

[2] (. . continued)

> (a) No certificate holder may use a person, nor may any person serve, as pilot in command in passenger-carrying operations of a turbojet airplane, of an airplane having a passenger seating configuration, excluding any pilot seat, of 10 seats or more, or a multiengined airplane being operated by the "Commuter Air Carrier" (as defined in part 298 of this title), unless that person holds an airline transport pilot certificate with appropriate category and class ratings and, if required, an appropriate type rating for that airplane.

Section 135.244, Operating experience, subsection (a)(2) reads:

> (a) No certificate holder may use any person, nor may any person serve, as a pilot in command of an aircraft operated by a Commuter Air Carrier (as defined in § 298.2 of this title) in passenger-carrying operations, unless that person has completed, prior to designation as pilot in command, on that make and basic model aircraft and in that crewmember position, the following operating experience in each make and basic model of aircraft to be flown :
> * * * * * * * *
>
> (2) Aircraft multiengined, reciprocating engine-powered - 15 hours.

[3] Respondent held Airman Certificate 506501432 with commercial pilot privileges.

There is no dispute that Miller Flying Service is a certified on-demand charter operator, and that respondent is qualified as a PIC for charter operations in the involved aircraft. The issue presented here is whether, in providing substituted service at the request of and on behalf of Mid-Continent, a certified commuter operator, respondent was subject to regulations applicable to PICS in commuter service. The answer requires an interpretation of those regulations.

Respondent claims he was operating as PIC, not in commuter service, but in a charter service for Mid-Continent that coincided with the latter's scheduled operations and for which Miller was paid on **a** per-mile basis. Respondent notes that he announced the nature of the service to the passengers prior to each flight, and argues that there appears no FAR restriction on his making a charter flight for an air carrier corporation. He claims that the cited FARs cannot reasonably be read to proscribe his actions. The Administrator, in support of his contention that the rules apply, focuses on issues of safety, the intent of the rules, and the reasons for the imposition in 1978 of the higher safety standards on commuter operations included in § § 135.243 and 244.[4]

The law judge dismissed the Administrator's order, finding that the commuter air carrier (Mid-Continent) was in violation of

[4]The Administrator notes that, if the conduct at issue here is not proscribed, commuter operators could "farm out" their operations to others and evade the heightened pilot qualifications.

the cited regulations but that respondent, as PIC, was not.[5]

The law judge concluded:

> It would appear under the evidence and under the FARs that the Respondent was operating exactly as he was authorized to do. There has been no showing . . . that there is a prohibition for doing charter flights for an air carrier corporation. There appears to be no restrictions at all on who the Respondent could make charter flights for . . . ." (Initial Decision at 6.)

We think that the law judge's analysis misconstrues the task before him. In charging respondent with violations of sections 135.243 and 135.244, the Administrator was, in effect, offering an interpretation of these sections that encompassed respondent's behavior. While the evolutionary interpretation of rules is thought to be better accomplished" through the rulemaking process itself, there is little question that the adjudicatory process may also be used to develop and define the meaning of existing regulations. Thus the law judge, in focusing solely on the apparent absence of explicit language or precedent, has too narrowly defined the necessary inquiry.

The question that the Board must answer is whether the interpretation now sought by the Administrator is sensible and in

---

[5]Although, at the hearing (Tr. p. 61), the law judge accurately set forth the relationship of the companies, the later initial decision confused that relationship. The initial decision (p. 3) incorrectly states: "Respondent was contacted by Miller Flying Semite to conduct flights on behalf of Miller Flying Service because of maintenance problems involving Miller Flying Service aircraft. At that time, Miller Flying Service was operating as Mid-Continent Airlines, d/b/a Braniff Express."

The parties agree that Miller Flying Service was contacted by Mid-Continent Airlines, which arranged for Miller Flying Service to provide service on certain Mid-Continent flights due to problems with Mid-Continent equipment.

conformance with the purpose and wording of the regulation.[6] The underlying purpose of the regulation and prior expressions by the Administrator, particularly if they are inconsistent with the position now advanced, obviously have a bearing on whether the contested interpretation can be accepted. So too would the stage in this adjudication at which the interpretation was first advanced, as the Board is under no obligation to accept on appeal the post hoc rationalizations of counsel. Additionally, when adjudication is used to develop policy interpretation, the possibility of insufficient notice of the newly arising liability may have implications regarding the acceptability of sanction for those initially charged. But, given the deference accorded by this Board to the interpretative prerogatives of the Administrator, the real question before the law judge was not whether the rule explicitly prohibited the conduct charged, but whether the Administrator's proposed interpretation of his Part 135 rule was reasonable.[7]

On their surface, both of the regulations involved speak in identical language to conduct by pilots: "nor may any person serve . . .". The argument is over the fact that both regulations also address themselves to aircraft "operated by" a commuter air carrier. Respondent contends that the flights in question were operated by Miller Flying Service -- an on-demand charterer --

---

[6] Cf. Martin v. OSHRC, ___ ___, 111 S. Ct. 1171, 1176 (1991], citing Northern Indiana Pub. Serv. Co. v. Porter County Izaak Walton League, 423 U.S. 12, 15 (1975).

[7] See Administrator v. Bowen, NTSB Order EA-3351 (1991).

and hence that the rules for commuters do not apply. The Administrator's position is that they were operated by Midcontinent Airlines, an authorized commuter airline doing business as Braniff Express. Respondent points to the fact that he was authorized to carry persons in charter flight, that Midcontinent engaged him as a charter operators,[8] and that passengers were told during pre-flight briefings that the flights were being operated as charter flights for Midcontinent. The Administrator argues that because (1) the flights were flown according to Midcontinent's published schedules, (2) the passengers were ticketed by Midcontinent and these tickets were accepted, and (3) the services of Miller Flying were paid for by Midcontinent, that the flights must be considered to have been commuter air flights.

We think the question is one on which there is no clearly compelled outcome. However, the. Administrator's interpretation of these rules is not one which is either logically or grammatically offensive to the language of the rules. Furthermore, the Administrator's argument reflects the practical position of the parties vis-a-vis each other. Miller Flying Service acted, in effect, as Mid-Continent's agent in performing service Mid-Continent was licensed but unable to perform. The

[8] Respondent was paid on a mileage basis without regard to numbers of passengers carried and the compensation was received from Midcontinent rather than from the passengers. Arguably these facts are consistent with charter operations, although they do not advance the inquiry as to whether the flights may nevertheless be considered to have been operated by Midcontinent.

service was provided under Mid-Continent ticketing, and schedules. Passengers were told the flight was being performed for Mid-Continent. Thus, it can fairly be concluded that Miller stood in Mid-Continent's shoes in providing service "operated by" Mid-Continent. Finally, while the Administrator has not argued the point, the critical term "operate" is defined in the Federal Aviation Regulations in a fashion sufficiently broad to encompass the Administrator's view:

> Operate with respect to aircraft means use, cause to use or authorize to use aircraft . . . with or without the right of legal control. (14 C.F.R. 1.1.) (Emphasis added.)

We would add that while the proposed interpretation is now offered for the first time, it is not inconsistent with any prior interpretative pronouncements (so far as we are aware). There remains, then, only the question of whether the interpretation is otherwise reasonable.

The regulations at issue are the product of significant revisions made in 1978 at a time when scheduled air service in comparatively small aircraft was becoming increasingly frequent due to changes in the market occasioned by a relaxation of price and entry controls. In his brief to the law judge, the Administrator cites some of the relevant considerations noted at the time of adoption. Among these were the fact that many commuter passengers intended connection with flights of the larger scheduled air carriers operating under the more stringent. standards of 49 C.F.R. Part 121. These passengers were presumed to expect, and were thought to be entitled to, the same high

level of safety-inspired flight regulation throughout their itinerary. The need for this greater attention to operator proficiency was seen to arise from the likelihood that commuter operations would increasingly involve the operation of turbine or multi-engine aircraft with a substantial number of passengers, and that these operations would frequently be conducted under instrument conditions and into and out of high volume terminals where the mix of traffic and aircraft types complicates a pilot's responsibilities.

The newly proposed 1978 rules created a division in Part 135 operators between those involved in traditional on-demand charters and those engaged in scheduled service. Among the changes, the new rules required that for Part 135 scheduled service, pilots needed to have an airline transport rating and more stringent aircraft type familiarity -- the rules at issue here. The obvious intent of these changes was to set higher PIC qualifications for commuter operations. Respondent was well aware that the Mid-Continent operation was a commuter operation? and that he would be providing equivalent, substitute service. It would not have been unreasonable to conclude that he would be subject to the same qualifications that would attach if Miller Flying Service were the commuter carrier.[9]

In light of the above, we conclude that the Administrator's

[9] Accord Administrator v. Mardirosian, NTSB Order EA-3216 (1990) (PIC knew or should have known that flight was regulated under Part 135 and he had not complied with training, competency, and pilot testing requirements applicable to the flight).

interpretation is consistent with the regulatory language and otherwise reasonable. In doing so, however, we emphasize that we are not holding these rules to be crystal clear as applied to respondent, or that this is the only possible interpretation. Even the Administrator acknowledges that none of the three involved parties was aware of the violations, thus suggesting that the rules are not as clear as they might be. What we are holding is that, given the deference due the Administrator's interpretation of his own rules, the Administrator's interpretation cannot be gainsaid in this forum.

The foregoing conclusion that the Administrator's interpretation of his rules should be affirmed does not, however, require affirmance of the 15-day sanction the Administrator imposed. Given all the circumstances,[10] and consistent with properly cognizable concerns for the sufficiency of notice provided to the aviation community, we think that waiver of sanction is appropriate. The Administrator specifically notes that his action here is exemplary, not punitive. Tr. p. 59. Unlike the Administrator, we do not think a 15-day suspension is necessary to get "the word around in the industry." Id.

[10] Particularly significant to the issues, of notice and sanction is the conversation that respondent had with FAA inspector Sazama prior to one of the flights in question. During this conversation, respondent alleges -- without rebuttal -- that he told Mr. Sazama that he was flying passengers for Midcontinent and that Mr. Sazama may have opined that this was a good way to earn extra income. While subsequent to this conversation Mr. Sazama suggested that another inspector look into the matter, by his own testimony, it is clear that Mr. Sazama addressed no warning or questioning to respondent.

Respondent performed the service with no mishap, and the testimony indicates that respondent had at least one communication with the FAA that may have given him the impression that the service was lawful.[11] And, as the Administrator recognizes (id.), respondent's employer and Mid-Continent were also unaware of the rules' applicability. Because the Administrator has alternative means for the announcement of interpretative developments, because the record here plainly indicates that respondent was unaware, and because the FAA missed at least one opportunity to correct that unawareness (assuming that FAA had then a developed policy), we do not believe that safety or the public interest requires affirmance of sanction.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted and his order is

---

[11]We do not read respondent's conversation with. Inspector Sazama as a direct inquiry into the legality of respondent's flights. Thus, it was not sufficient to discharge his duty to know and conform to the FAR or to inquire further should he be unsure. The conversation was characterized by both as "small talk" (Tr. pps. 28, 52), and there is no evidence that it was for the purpose of determining the legality of the operation. It is also not clear the discussion occurred prior to the first flight, nor whether Mr. Sazama understood or was given all the details. Nevertheless, that this conversation could have occurred as it did reflects precisely on the necessity of establishing adequate notice of enforcement policy within the affected community.

Our holding (albeit without sanction) that respondent violated the FAR is based in large part on our conclusion that respondent had reasonable notice of the potential violation and should have, at minimum, inquired further. In other cases -- where respondents had no basis to believe a violation would result and, therefore, no duty to inquire further -- we have dismissed the complaint. See, e.g., Administrator v. Hart, 2 NTSB 1110 (1974).

affirmed to the extent that violations of 14 C.F.R. Part 135 § § 243 and 244(a)(2) are found; and

2. The initial decision is reversed.

COUGHLIN, Acting Chairman, LAUBER, KOLSTAD, and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order. Member HART submitted the following dissenting statement.

DISSENTING STATEMENT BY **ME-3**
FOR NOTATION NO. 5695
May 6, 1992

Dissent by Member Hart: The question of whether and how to sanction a respondent on a broad issue of first impression is a difficult one. Clearly, regulators can never anticipate all of the situations that will arise under their requlations, and adjudicative interpretation must therefore be one means of putting meat onto the regulatory skeleton. However, regulators should generally favor rulemaking, and use individual adjudication only sparingly , in first annoucing changes of broad applicability.

In this case the majority presents arguments that respondent should not be sanctioned because the Administrator should not use an individual adjudication to announce a policy of broad applicability. The majority also presents arguments, however, that we should affirm the violation because this respondent knew or should have known that his behavior was proscribed by the regulation. As a commpromise, the decision "splits the baby" by affiming the violation while "waiving" the sanction.

I believe that this result inappropriately confuses our appellate function – in which we are serving in this context – with our instigating and recommending functions. As investigators who issue remmmdations, our mandate includes the quasi-legislative authority and obligation to do whatever in our view most effectively and efficiently advances transportation safety and the public interest within the bounds of our enabling statutes. In our appellate role, however, we are not so free to legislate; instead, we are limited to adjudicating the facts of the case within the framework of the applicable laws and regulations, while deferring appropriately to the Administrator's interpretations of its own rules if such interpretations are lawful, rational, and reasonable.

In the instant case, therefore, I believe that we should either dismiss the case on due process grounds because of the lack of prior notice regarding the scope of the prohibition, or affirm both the violation and the sanction on the grounds that respondent knew or should have known that his activity was proscribed. I do not believe that it is appropriate for us, in our appellate role, to attempt to compromise the two by affirming the violation while waiving the sanction.